U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

In the Matter of:

SHANNON GLADDEN,

COMPLAINANT,

v.

THE PROCTOR AND GAMBLE COMPANY,

RESPONDENT.

ARB CASE NO. 2022-0012

ALJ CASE NO. 2021-SOX-00012
ALJ MONICA MARKLEY

DATE: May 9, 2023

Appearances:

For the Complainant:
Spencer H. Silvergate, Esq. and Craig Salner, Esq.; *Clarke Silvergate, P.A.*; Miami, Florida

For the Respondent:
Scott A. Carroll, Esq. and David A. Nenni, Esq.; *Jackson Lewis P.C.*; Cincinnati, Ohio; Jeffrey A. Schwartz; *Jackson Lewis P.C.*; Atlanta, Georgia

Before HARTHILL, Chief Administrative Appeals Judge, and BURRELL and PUST, Administrative Appeals Judges; BURRELL, Administrative Appeals Judge, Concurring in Part and Dissenting in Part

DECISION AND ORDER

HARTHILL, Chief Administrative Appeals Judge:

Shannon Gladden (Complainant or Gladden) filed a complaint under the Sarbanes-Oxley Act of 2002[1] (SOX), as amended, and its implementing regulations,[2]

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[1] 18 U.S.C. § 1514A.

[2] 29 C.F.R. Part 1980 (2022).

alleging that The Procter and Gamble Company[3] (Respondent or P&G) unlawfully retaliated against her. After an investigation, the U.S. Department of Labor's (Department) Occupational Safety and Health Administration (OSHA) dismissed her complaint. Complainant filed objections and requested a hearing with an Administrative Law Judge (ALJ). Respondent filed a Motion to Dismiss, arguing that res judicata barred the action. The ALJ issued an Order Granting Respondent's Motion to Dismiss (D. & O.) and denied Complainant's Motion for Reconsideration.

Complainant timely appealed the ALJ's decisions to the Administrative Review Board (ARB or Board). After the parties had completed briefing on appeal, the Board issued an order inviting the Assistant Secretary of Labor (Assistant Secretary or amicus) for OSHA to submit a brief as amicus curiae.[4] The Assistant Secretary filed an amicus brief and the parties filed responses. For the following reasons, we now affirm the ALJ's D. & O. and Order Denying Complainant's Motion for Reconsideration.

BACKGROUND

Complainant worked for Respondent as a relationship manager for a contract between Respondent and Promoveo Health (Promoveo) to sell Respondent's dental products.[5] On or around September 2018, Respondent's human resources

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[3] Respondent has represented to the Administrative Review Board and the Administrative Law Judge that "The Procter & Gamble Company is not a properly named respondent. Complainant Shannon Gladden's employer was The Procter & Gamble Distributing LLC, an indirectly but wholly owned subsidiary of The Procter & Gamble Company." Respondent (Resp.) Response to Assistant Secretary Amicus Brief (Response to Amicus Br.) at n.1; *see also* Resp. Appendix (App.) at Tab 1, Resp. Memorandum in Support of Motion for Dispositive Action (Mot. for Dispositive Action) at 1 n.1. However, it does not appear that Respondent requested either adjudicatory body to substitute the subsidiary company as the named respondent in this matter.

[4] Specifically, the ARB invited briefing on "[w]hether the doctrine of res judicata applies to bar SOX whistleblower retaliation claims that remain within the Department's adjudicative tribunal, after a federal court has issued a final decision in a case involving the same cause of action, when the federal court's decision occurred more than 180 days after the SOX claim had been filed with OSHA and the complainant could have removed the OSHA claim to federal court." ARB Order Inviting Amicus Briefing By Assistant Secretary for OSHA at 5.

[5] *Gladden v. Proctor & Gamble Distrib. LLC*, No. 1:19-CV-2938-CAP-JSA, 2021 WL 4929913, at *1 (N.D. Ga. Sept. 8, 2021) (decision adopting magistrate judge's report and

department (HR) began investigating complaints that Complainant had violated company policy by sharing confidential information about the Promoveo contract with outside parties and contacting Promoveo employees about their salary.[6] During the investigation, Complainant admitted to discussing compensation with Promoveo employees, and Respondent placed her on paid leave.[7] On September 28, 2018, Respondent terminated Complainant's employment, stating that Respondent had lost trust and confidence in Complainant's ability to perform her job.[8]

On March 21, 2019, Complainant filed gender discrimination and retaliation claims with the Equal Employment Opportunity Commission (EEOC), alleging that Respondent had discriminated against her based on her gender in violation of Title VII of the Civil Rights Act of 1964 (Title VII).[9] A party that intends to file a Title VII discrimination lawsuit in court must first file the charge with the EEOC.[10] If the EEOC dismisses the claim or has not brought a civil action under the charge within 180 days after the filing of the charge, the EEOC must issue a notice of right to sue (right-to-sue notice) permitting the party to file a civil action within 90 days.[11]

On March 22, 2019, Complainant filed a complaint with OSHA, alleging that Respondent had violated the SOX by discharging her in retaliation for her reporting that Promoveo was falsely portraying itself as a minority-owned business.[12] A party that alleges discrimination under the SOX must initially file a complaint with the Department and OSHA will begin an investigation into the complaint.[13] A

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recommendation (Decision Adopting R&R)), *aff'd*, No. 21-13535, 2022 WL 2974066 (11th Cir. July 27, 2022), *cert. denied*, No. 22-713, 143 S.Ct. 1044, 2023 WL 2563446 (2023).

6 Decision Adopting R&R at *2.

7 *Id.* at *3.

8 *Id.*

9 Resp. App. at Tab 6, Resp. Memorandum in Support of Motion to Dismiss (Mot. to Dismiss) at 2; Decision Adopting R&R at *1.

10 *Forehand v. Fla. State Hosp. at Chattahoochee*, 89 F.3d 1562, 1567 (11th Cir. 1996) (citation omitted).

11 42 U.S.C. § 2000e-5(f)(1); 29 C.F.R. §1601.28(b). The complainant may also request a right-to-sue letter after 180 days after filing the charge. 29 C.F.R. §1601.28(a)(1).

12 D. & O. at 1-2. Complainant also raised allegations of "wire fraud and fraud against the shareholders." *Id.* at 2 (inner quotations omitted).

13 18 U.S.C. § 1514A(b)(1); 29 C.F.R. § 1980.104. The party files the complaint with OSHA. *See* 29 C.F.R. § 1980.103.

complainant may bring an action in federal district court if OSHA has not issued a final decision within 180 days of the filing of the complaint.[14]

The EEOC issued a right-to-sue notice to Complainant, stating that it was unlikely that the EEOC would be able to complete its investigation within 180 days.[15] The EEOC therefore terminated its processing of the charge and Complainant had the right to bring her civil action.[16] On June 26, 2019, Complainant filed a wrongful discharge claim under Title VII in the U.S. District Court for the Northern District of Georgia.[17] Complainant claimed that Respondent had unlawfully terminated her employment because she was a woman and because she engaged in protected activity by informing HR that the investigation into her actions was being conducted in a more antagonistic manner compared to investigations of her male colleagues.[18] On October 9, 2019, P&G filed its Answer in the Title VII action in which P&G claimed that "Plaintiff's claims are barred, in whole or in part, by the doctrines of waiver, estoppel, and/or unclean hands."[19]

During OSHA's investigation into the SOX complaint, P&G filed a letter with the OSHA investigator on July 25, 2019, in which P&G noted that Gladden's SOX complaint had been "superseded" by Gladden's Title VII lawsuit, filed on June 26, 2019.[20] In particular, P&G argued that "Gladden's federal lawsuit claims defeat her SOX claims with OSHA because she asserts that she would still be employed by P&G if it were not for gender discrimination and her complaints about gender discrimination."[21] In addition, P&G argued that "[t]his means that she contends her

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14 18 U.S.C. § 1514A(b)(1); 29 C.F.R. § 1980.114.

15 Complainant (Comp.) App. at Tab F, EEOC Notice of Right to Sue.

16 *Id.*

17 Resp. App. at Tab 6, Resp. Mot. to Dismiss at 2; *see also* Amicus Brief (Br.) at 4.

18 Decision Adopting R&R at *4, 8.

19 Resp. Supplemental (Suppl.) App. at Tab 14, Resp. Answer at 12. The Respondent's Answer includes a certificate of service, certifying that Respondent electronically served the Answer on Gladden's counsel. *Id.* at 16.

20 Resp. Suppl. App. at Tab 13, Resp. Response Letter to Comp. June 24, 2019 Letter at 8. P&G provided Gladden's counsel with a copy of its July 25, 2019 letter to OSHA. *See* Resp. Suppl. App. at Tab 13 (July 25, 2019 email from David A. Nenni to Craig Salner).

21 Resp. Suppl. App. at Tab 13, Resp. Response Letter to Comp. June 24, 2019 Letter at 8.

purported complaints about Promoveo's alleged breaches of contract would not have resulted in her termination and SOX is not implicated in any way."[22]

On September 19, 2019, OSHA issued Complainant a "kick out" letter informing her that she could bring her SOX complaint in federal district court because the Secretary of Labor had not issued a decision on her claim within 180 days.[23] Complainant did not move her SOX claim to federal court but instead left it within OSHA's jurisdiction.

On February 8, 2021, OSHA completed its investigation and issued findings that there was no reasonable cause to believe that Respondent had violated the SOX with regard to Complainant's termination, and therefore dismissed the complaint.[24] On March 9, 2021, Complainant objected to the findings and requested a hearing before an ALJ.[25] On April 23, 2021, Respondent submitted initial disclosures to Gladden in the SOX matter pending before the ALJ.[26] Respondent's Initial Disclosures stated: "P&G . . . objects to this appeal because Gladden is pursuing piecemeal litigation about the subject of her termination in two separate forums."[27] Furthermore, on May 4, 2021, Respondent filed a memorandum in support of its Motion for Dispositive Action in the SOX action, in which Respondent noted that: "P&G . . . objects to issues of Gladden's discharge being heard piecemeal in different venues."[28]

On January 11, 2021, both Complainant and Respondent moved for summary judgment in the Title VII action.[29] On February 1, 2021, Respondent filed a

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22 *Id.*

23 Comp. App. at Tab G, OSHA Letter to Comp. The e-mail accompanying the OSHA letter states: "Please see the attached OSHA letter advising you of the 'kick out' option for this matter." *See* Comp. App. Tab G (September 19, 2019 e-mail from Federal Investigator to Craig Salner).

24 D. & O. at 2; Comp. App. at Tab I, Investigator's Findings.

25 D. & O. at 2.

26 Resp. Supp. App. at Tab 15, Resp. Initial Disclosures.

27 *Id.* at 1 n.1. P&G provided Gladden's counsel with a copy of its Initial Disclosures. *See* Resp. Supp. App. at Tab 15 (April 23, 2021 email from David A. Nenni to Craig Salner).

28 Resp. App. at Tab 1, Resp. Mot. for Dispositive Action at 7 n.6. Respondent provided notice of its Motion for Dispositive Action to Gladden's counsel. *See* Resp. App. at Tab 1 (Resp. Notice of Motion for Dispositive Action).

29 Resp. Br. at 5; Decision Adopting R&R at *1.

memorandum in opposition to Complainant's Motion for Summary Judgment (Opposition Memorandum). In the Opposition Memorandum, P&G stated that "Gladden has a pending OSHA [c]harge she brought pursuant to the Sarbanes-Oxley Act ('SOX'), in which she brought similar . . . claims regarding purported retaliation for compliance concerns. The elements of a SOX retaliation claim stand independent of and are unrelated to Title VII claims."[30] P&G went on to claim that "[t]hese are different statutes concerning different fact situations," and that the court "should ignore any effort by Gladden to conflate the two."[31]

On July 26, 2021, the presiding magistrate judge issued a report and recommendation (R&R) that the district court judge grant Respondent's Motion for Summary Judgment in the Title VII action.[32] Complainant filed objections to the R&R. On September 8, 2021, the district court judge issued a final order adopting the R&R and dismissing the Title VII action, concluding that there was no genuine issue of material fact that Respondent's stated reason for Complainant's firing was not pretextual and that Complainant had failed to establish a prima facie case of retaliation.[33]

On August 26, 2021, the ALJ took official notice of the magistrate judge's R&R upon Respondent's request.[34] On September 24, 2021, Respondent filed a motion to dismiss the SOX claim, noting the district court judge's dismissal order and arguing that res judicata prohibited further prosecution of the SOX claim before the ALJ.[35]

On October 22, 2021, the ALJ granted Respondent's motion to dismiss. The ALJ considered whether Respondent had proven the four required elements of res judicata: (1) a court of competent jurisdiction entered a final decision on the merits in a previous action, (2) the current action involves the same parties or their privies in the previous action, (3) the current action raises claims that were litigated or

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30 Amicus Br. Exhibit (Ex.) A, Resp. Memorandum in Opposition (Mem. Opp'n) to Comp. Motion for Summary Judgment (Mot. Summ. J.) at 14-15 (citations omitted).

31 *Id.* at 15.

32 Resp. App. at Tab 4, Resp. Notice of R&R to the Office of Administrative Law Judges.

33 Decision Adopting R&R at *1, 7, 8.

34 D. & O. at 2.

35 *Id.* at 1-2.

could have been raised in the previous action, and (4) the cases involve the same cause of action or common nucleus of operative fact.[36] The ALJ concluded that the first two of four required elements of a res judicata defense, a prior final decision by a court of competent jurisdiction and a second action involving the same parties, were met.[37]

For the third required element, the ALJ noted that the parties did not litigate the SOX claim in district court but that Respondent had argued that the claim could have been brought with the Title VII claim.[38] Respondent cited *Evans v. Affiliated Computer Services*,[39] an ALJ decision in which a complainant had filed an employment retaliation case in federal district court and a SOX complaint with OSHA that both involved the same operative set of facts.[40] After the district court had dismissed the retaliation case, an ALJ dismissed the SOX claim because there had been no impediment to the complainant consolidating the SOX claim with the retaliation claim in federal court.[41] Like in *Evans*, the ALJ noted that she and the district court judge had to discuss the same facts involving Complainant's termination in considering the parties' arguments and that Complainant could have easily consolidated her SOX claim with her Title VII action.[42] The ALJ therefore found that the case met the third element of res judicata.[43]

Last, the ALJ determined whether the cases involved the same cause of action, or nucleus of operative facts. The ALJ cited *Thanedar v. Time Warner, Inc.*,[44]

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36 *Id.* at 3-4 (citing *Abbs v. Con-Way Freight, Inc.*, ARB No. 2008-0017, ALJ No. 2007-STA-00037, slip op. at 7 (ARB July 27, 2010)). Although the ALJ used the term "should," the correct inquiry is whether the claim *could* have been raised in the other action. *In re Piper Aircraft Corp.*, 244 F.3d 1289, 1296 (11th Cir. 2001). *See also McNeill v. Crane Nuclear, Inc.*, ARB No. 2002-0002, ALJ No. 2001-ERA-00003, slip op. at 4 (ARB July 29, 2005) ("Claim preclusion refers to litigation of a matter that never has been litigated but could have been litigated in an earlier suit.") (citations omitted).

37 D. & O. at 3-4 (citation omitted). The ALJ noted that the parties did not dispute the first two elements. *Id.* at 4.

38 *Id.*

39 ALJ No. 2012-SOX-00035 (ALJ Jan. 29, 2019).

40 D. & O. at 4.

41 *Id.*

42 *Id.*

43 *Id.* at 4-5.

44 352 F. App'x 891, 898 (5th Cir. 2009).

in which the Fifth Circuit Court of Appeals concluded that a plaintiff's Title VII suit and subsequent SOX complaint arose from the same core set of facts and that the later suit was barred by res judicata, even if the retaliatory motives in both cases were different.[45] The ALJ determined that Complainant's two actions involved the same nucleus of operative facts because both cases focused on whether Respondent had a legitimate reason for discharging Complainant and examined the circumstances of the termination.[46] Therefore, the ALJ concluded that the fourth required element of res judicata was met and granted the motion to dismiss.[47]

On November 1, 2021, Complainant filed a Motion for Reconsideration of the dismissal.[48] Complainant argued that the ruling morphed her permissive right to remove the SOX claim into an obligation, that the cases cited by Respondent were distinguishable, and that the application of res judicata created a manifest injustice.[49] On November 16, 2021, the ALJ denied the motion, holding that Complainant had failed to present evidence of an intervening change in the law, new evidence, a clear error, or manifest injustice and that the motion consisted mostly of the same arguments Complainant had made in her opposition to the motion to dismiss.[50]

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Board the authority to act on appeal from ALJ decisions arising under the SOX and issue agency decisions in those matters.[51] In SOX cases, the Board will affirm the ALJ's factual findings if

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45 D. & O. at 5-6 (citing *Thanedar*, 352 F. App'x at 898).

46 *Id.* at 6.

47 *Id.* at 6-7. Complainant had moved to require Respondent's compliance with discovery in her opposition to the motion to dismiss, which the ALJ denied as moot. *Id.* at 7.

48 Order Denying Comp. Motion for Reconsideration at 1.

49 *Id.*

50 *Id.* at 3.

51 Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13186 (Mar. 6, 2020).

supported by substantial evidence but reviews all conclusions of law de novo.[52] The Board reviews orders on motions to dismiss on a de novo basis.[53]

DISCUSSION

Complainant contests the ALJ's orders dismissing her complaint and denying her motion for reconsideration, arguing that res judicata does not bar her SOX claim. Under the doctrine of res judicata, also known as claim preclusion, a final judgment on the merits of an action precludes the parties or their privies from relitigating claims that were or could have been raised in the prior action.[54] Res judicata arises from a judgment.[55] Thus, if two actions are pursued simultaneously, the first judgment to be entered is entitled to res judicata effect without regard to the order in which the two were commenced.[56]

The doctrine protects against "the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions."[57] A party seeking to apply the doctrine must establish that (1) a court of competent jurisdiction entered a final decision on the merits in a previous action, (2) the current action involves the same parties or their privies in the previous action, (3) the current action raises claims that were litigated or could have been raised in the previous action, and (4) the cases involve the same cause of action or common nucleus of operative fact.[58] We review de novo whether Respondent properly established each element.

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[52] 29 C.F.R. § 1980.110(b); *Burns v. The Upstate Nat'l Bank*, ARB No. 2017-0041, ALJ No. 2017-SOX-00010, slip op. at 2 (ARB Feb. 26, 2019).

[53] *Yadav v. Frost Bank*, ARB No. 2020-0048, ALJ No. 2020-SOX-00017, slip op. at 4 (ARB June 24, 2021).

[54] *In re Piper Aircraft Corp.*, 244 F.3d at 1296; *see Abbs v. Con-Way Freight, Inc.*, ARB No. 2008-0017, ALJ No. 2007-STA-00037, slip op. at 7 (ARB July 27, 2010). *See generally* 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4402 (3d ed. Apr. 2023 update).

[55] *Id.* § 4404.

[56] *Id.*

[57] *Ragsdale v. Rubbermaid, Inc.*, 193 F.3d 1235, 1238 (11th Cir. 1999) (quoting *Montana v. United States*, 440 U.S. 147, 153-54 (1979)).

[58] *Abbs*, ARB No. 2008-0017, slip op. at 7; *In re Piper Aircraft Corp.*, 244 F.3d at 1296; *cf. McNeill,* ARB No. 2002-0002, slip op. at 4.

1. Final Decision on the Merits and Same Parties

First, a court of competent jurisdiction must have entered a final decision on the merits in a previous action. Complainant contends that res judicata does not apply to her claim because the SOX whistleblower claim was never adjudicated in any forum. However, this factor concerns only whether a court with proper jurisdiction rendered a final decision in a previous action. Complainant does not argue that the federal district court lacked jurisdiction over the Title VII claim in the previous action, and summary judgments are considered final judgments on the merits.[59] Therefore, the first element is met because the district court ordered summary judgment on Complainant's Title VII claim.

Next, res judicata requires that both cases involve the same parties or their privies. There is no dispute that Complainant and Respondent were the parties in the district court action and in the action before the ALJ. Therefore, the second element of res judicata is also met.

2. Claims Previously Litigated or Could Have Been Litigated

The third required element of res judicata considers whether the second action involves claims that were litigated or could have been litigated in the previous action.[60] It is a "well-established rule that a plaintiff cannot avoid the effects of res judicata by 'splitting' his claim into various suits, based on different legal theories."[61] Therefore, the fact that Complainant's SOX claim involved allegations of protected activity related to her revealing contract issues involving Promoveo, while her Title VII action involved claims of gender discrimination and retaliation, is a distinction that makes no difference with regard to the applicability of res judicata.

Complainant asserts, instead, that the procedural timing of her two claims prevents the establishment of this third element of res judicata. The facts reveal otherwise. Complainant filed her Title VII claim on June 26, 2019. She had the option to move her SOX claim to federal district court in early September 2019.

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[59] *Bazile v. Lucent Techs.*, 403 F. Supp. 2d 1174, 1181 (S.D. Fla. 2005); *Jang v. United Techs. Corp.*, 206 F.3d 1147, 1149 (11th Cir. 2000).

[60] *In re Piper Aircraft Corp.*, 244 F.3d at 1296.

[61] *Riel v. Morgan Stanley*, No. 06-CV-5801, 2009 WL 2431497, at * 4 (S.D.N.Y, Aug. 6, 2009) (quoting *Waldman v. Vill. of Kiryas Joel*, 207 F.3d 105, 110 (2d Cir. 2000)).

Respondent did not move for summary judgment on the Title VII claim until January 11, 2021. Therefore, though she was not initially able to bring both claims together because of statutory mandates, Complainant had at least a year to join the SOX claim with the Title VII claim in federal court. As noted by Respondent, Complainant could have amended her complaint in district court to include the SOX claim as a matter of course under the Federal Rules of Civil Procedure (FRCP) by October 23, 2019,[62] over a month after OSHA provided the "kick out" letter to Complainant on September 19, 2019.[63] Even if she did not amend the complaint by then, the FRCP provides that a court "should freely give leave" to amend pleadings "when justice so requires."[64] Therefore, Complainant could have litigated the SOX claim in district court with her Title VII claim. She chose not to do so.

Complainant and the dissent claim that applying res judicata converts her option to move her SOX claim to federal court into an obligation, which conflicts with the SOX's statutory scheme.[65] While we appreciate the significance of the SOX statutory scheme, providing complainants with the option to keep their claims within the Department, the language and policy of SOX do not undercut the application of well-settled res judicata principles.[66] Complainant did not lose her

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[62] FED. R. CIV. P. 15(a)(1)(B) ("A party may amend its pleading once as a matter of course . . . if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading."). Respondent filed its answer to the Title VII complaint on October 2, 2019. Resp. App. at Tab 10, Resp. Opposition to Comp. Motion for Reconsideration at 4-5.

[63] Comp. App. at Tab G, OSHA Letter to Comp.

[64] Fed. R. Civ. P. 15(a)(2).

[65] *See* 18 U.S.C. § 1514A(b)(1)(A)-(B) (a person who alleges discharge or other discrimination may seek relief by filing a complaint with the Secretary of Labor, or in federal district court if the Secretary has not issued a final decision within 180 days of the filing of the complaint).

[66] *See Woods v. Dunlop Tire Corp.*, 972 F.2d 36, 39-40 (2d Cir. 1992) (applying res judicata while also acknowledging the court's commitment to giving full effect to the Title VII scheme set up by Congress). The dissent also argues that courts have protected a complainant's right to the administrative process, even when it leads to judicial inefficiency if the complainant subsequently removes the claim to federal court. Dissent Opinion (Dissent) at 36-38 (citing *Lawson v. FMR LLC*, 724 F. Supp. 2d 141, 151 (D. Mass. 2010), *rev'd on other grounds*, 670 F.3d 61 (1st Cir. 2012), *rev'd*, 571 U.S. 429 (2014); *Stone v. Instrumentation Lab. Co.,* 591 F.3d 239, 249 (4th Cir. 2009)). Those cases are not applicable here because they did not include a final decision, which is necessary for res judicata to apply (*Lawson* and *Stone* involved collateral estoppel). After the ALJ had issued a ruling on their SOX claims, the complainants in *Lawson* and *Stone* filed for de novo review in federal district court pursuant to § 1514A(b)(1)(B), which prevented the ALJ's rulings from

statutory choice of forum, and was not "obligated" to remove her SOX claim to federal court; rather she assumed the risk that having made her choice not to join the claims, her SOX claim might be subject to a res judicata defense.[67]

Indeed, in *Leon v. IDX Systems Corp.*,[68] the Ninth Circuit Court of Appeals held that a complainant's SOX claim before the Department was subject to res judicata after the parties had litigated several claims concerning the same cause of action, including a Title VII claim, in federal district court.[69] The court held the fact that the complainant "did not actually bring a SOX claim [in district court] does not preclude the satisfaction of the identity of claims requirement, because he could have amended his complaint to add the SOX claim after 180 days had passed without any action by the [Department]."[70]

The dissent attempts to distinguish *Leon* as a sanctions case, rather than a res judicata case, noting that a district court dismissed plaintiff's initial federal action because of spoliation of evidence and that the Ninth Circuit merely gave effect to the first court's sanction. We do not agree that these factual differences meaningfully distinguish *Leon* from the present case. The dismissal for spoliation of evidence in *Leon* was a final judgment on the merits, necessary for claim preclusion to apply. The Ninth Circuit never expressly or implicitly suggested that a sanction of dismissal makes the application of res judicata in that case distinguishable from other applications of res judicata, nor that perceived bad acts on the part of a party

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becoming final decisions. *See Lawson*, 724 F. Supp. 2d at 148, 150-52; *Stone*, 591 F.3d at 242, 249. In contrast, the case at hand includes a final judgment on the merits in a Title VII suit, allowing for the application of res judicata to Complainant's SOX suit. Furthermore, *Lawson* and *Stone* are not applicable here because repetition in those cases "was clearly contemplated as possible by the statute's general provision for 'de novo review.'" *Lawson*, 724 F. Supp. 2d at 151. We decline to expand the courts' statutorily-mandated outcome in those cases to swallow the application of res judicata in other contexts.

67 As noted, in Section 4 *infra*, the defense is subject to exceptions, such as the opposing party's acquiescence.

68 464 F.3d 951 (9th Cir. 2006).

69 *Id.* at 955-56, 963. The employer had moved to enjoin the Department's investigation of the SOX claim as barred by res judicata in federal court under the All Writs Act. *Id.* at 957. The All Writs Act "empowers a district court to issue injunctions to enforce judgments and to reinforce the effects of the doctrines of res judicata and collateral estoppel." *Id.* at 961 (quoting *Charlton v. Estate of Charlton*, 841 F.2d 988, 989 (9th Cir. 1988)). The district court denied the motion to enjoin, and the Ninth Circuit reversed the order denying the injunction and remanded the injunction issue for further consideration. *Id.* at 961-62.

70 *Id.* at 962 n.8.

is at all relevant to the application of the legal doctrine. Rather, the court endorsed the use of res judicata to bar a SOX claim from continuing to be processed within the Department after the resolution of a previous federal court action involving the same cause of action. Indeed, the court noted that *Leon*, like Complainant in the present case, had an opportunity to merge the SOX claim with the district court action 180 days after filing the claim with OSHA. While *Leon* differs from this case because there the defendant was requesting a federal court to enjoin the Department's processing of the SOX matter under the All Writs Act rather than requesting an ALJ to dismiss the claim, we determine that these were merely two different procedural mechanisms available for dismissing a claim barred by res judicata.

The dissent further claims that the third element of res judicata is not met in the instant case because the SOX claim could not have been brought initially with the Title VII claim in federal court, noting that the doctrine of res judicata does not apply to claims that arise after the filing of the initial complaint.[71] The dissent appears to argue that the SOX claim reaching the 180-day mark permitting its removal amounts to the maturation of a new claim, which prevents the application of res judicata.

The dissent discusses three cases in support of this argument, all of which hold that claims that arise during the pendency of the initial litigation are not barred by res judicata: (1) *Manning v. City of Auburn*,[72] (2) *Legnani v. Alitalia Linee Aeree Italiane, S.P.A.*,[73] and (3) *Los Angeles Branch NAACP v. Los Angeles Unified School District*.[74] All of these cases involve "a transaction [between the parties] occurring after the commencement of the prior litigation."[75] In *Manning*, the plaintiff alleged discriminatory acts that occurred after the earlier filing of a class

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[71] Dissent at 33 (citing *Addis v. Dep't of Labor*, 575 F.3d 688, 689 (7th Cir. 2009)).

[72] 953 F.2d 1355, 1360 (11th Cir. 1992) ("[W]e do not believe that the res judicata preclusion of claims that 'could have been brought' in earlier litigation includes claims which arise after the original pleading is filed in the earlier litigation.").

[73] 400 F.3d 139, 141-43 (2d Cir. 2005) ("Claims arising subsequent to a prior action need not, and often perhaps could not, have been brought in that prior action . . . .") (citation omitted).

[74] 750 F.2d 731, 739 (9th Cir. 1984) ("The scope of litigation is framed by the complaint at the time it is filed.").

[75] *Legnani*, 400 F.3d at 141.

action lawsuit alleging a pattern of discrimination by her employer.[76] In *Legnani*, the plaintiff's retaliatory discharge claim was not barred because she had not been fired from her job before the filing of her earlier Title VII sexual harassment claim.[77] In *Los Angeles Branch NAACP*, the court held that claims of unlawful acts of segregation committed by the defendant after the close of the previous litigation seeking to desegregate a school district were not barred by res judicata.[78]

Unlike the plaintiffs in those three cases, Complainant does not allege that any further unlawful actions occurred after she filed her Title VII claim in federal court. Rather, the factual predicates of Respondent's employment termination, which occurred before either claim was filed, are the same in both the Title VII and SOX actions and the same underlying occurrence constitutes the cause of action. The fact that her SOX claim reached the 180-day mark did not constitute a new transaction between the parties or new discriminatory act giving rise to a new claim, rather, it provided Gladden with the statutory option to move her existing SOX claim from DOL to federal court.

Federal courts have determined that claims that are part of the same transaction must be brought if they can be brought during the pendency of the litigation, even if a particular claim was not yet available at the time the initial action was filed.[79] This includes claims that involve some form of administrative

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[76] 953 F.2d at 1357-58. A previous class action lawsuit had alleged that the plaintiff's supervisor had engaged in a pattern of discrimination including denial of overtime and sick pay. *Id.* at 1357. The court dismissed plaintiff from the class action because of lack of participation. *Id.* The plaintiff later filed a discrimination action alleging that her employer began to deny her employment entitlements on the basis of sex and age after the filing of the class action. *Id.* at 1357-58.

[77] 400 F.3d at 140-41. The plaintiff alleged that she was fired in retaliation for bringing the Title VII claim. *Legnani v. Alitalia Linee Aeree Italiane, S.P.A.*, 274 F.3d 683, 685 (2d Cir. 2001).

[78] 750 F.2d at 734-46 (applying California law).

[79] *See Stone v. Dep't of Aviation*, 453 F.3d 1271, 1278 (10th Cir. 2006) ("[D]octrine requires a plaintiff to join all claims together that the plaintiff has against the defendant *whenever during the course of the litigation related claims mature* and are able to be maintained."); *Bravo-Pedroza v. Gonzales*, 475 F.3d 1358, 1360 (9th Cir. 2007) (ruling that doctrine of res judicata barred initiation of a second deportation case against alien on basis of the same charges, where new charges could have been brought during pendency of prior proceeding); *Role Models Am., Inc. v. Penmar Dev. Corp.*, 394 F. Supp. 2d 121, 134 (D.D.C. 2005), *aff'd*, 216 F. App'x 5 (D.C. Cir. 2007) (holding that a plaintiff "cannot later litigate a new claim against the same defendant (or its privy) where the facts supporting the subsequent claim arose from the same set of events as the prior action and were known to

exhaustion requirement prior to litigation in federal court, such as Title VII claims. Similar to SOX whistleblower complaints, Title VII discrimination claims may be brought in federal court after the plaintiff initially files the claim with a federal agency, the EEOC. The plaintiff in the Title VII complaint must receive permission to file in district court from the EEOC via a right-to-sue notice, which generally occurs either after the EEOC dismisses the claim or 180 days pass from the filing of the claim without the EEOC filing a civil action.[80]

The case of *Woods v. Dunlop Tire Corp.*,[81] is instructive on this point. In *Woods*, the Second Circuit Court of Appeals held that res judicata barred the plaintiff's Title VII claims even though she had not yet received her EEOC right-to-sue notice at the time she filed a Labor Management Relations Act claim in federal court, which claim involved the same cause of action and parties and was later dismissed by summary judgment.[82] Citing *Woods*, in *Jang v. United Technologies Corp.*,[83] the Eleventh Circuit Court of Appeals held that res judicata applied to an Americans with Disabilities Act discrimination claim, which also requires a right-to-sue notice from the EEOC for removal, after the plaintiff failed to obtain the notice during the pendency of previous litigation involving the same cause of action.[84] Several other circuits also have held that res judicata applies to Title VII claims in which plaintiffs failed to take measures to avoid preclusion, despite the

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the plaintiff during the pendency of the prior action . . . ."); *Schwartz v. Bogen*, 913 F.3d 777, 782 (8th Cir. 2019) (holding that res judicata barred ERISA violation lawsuit in federal court because the claim ripened before the entry of a state court judgment involving same cause of action); *Oreck Direct, LLC v. Dyson, Inc.*, 560 F.3d 398, 403 (5th Cir. 2009) (ruling that res judicata applied where the allegedly false advertisements at issue were aired during the pendency of the prior claim involving the same false advertising).

80 42 U.S.C. § 2000e-5(f)(1) ("If a charge filed . . . is dismissed by the Commission, or if within one hundred and eighty days from the filing . . . the Commission has not filed a civil action . . . the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent . . . .")

81 972 F.2d 36 (2d Cir. 1992).

82 *Id.* at 38-41. The court concluded that the application of res judicata was not inconsistent with the Title VII administrative scheme, holding that "the fact that Congress preferred that Title VII disputes be resolved in the administrative forum does not necessarily excuse compliance with general rules governing federal litigation respecting other potentially viable claims." *Id* at 39-40.

83 206 F.3d at 1149.

84 *Id.* at 1149. A plaintiff is entitled to request a right-to-sue letter after 180 days of filing a claim if the EEOC does not provide one on its own initiative. *Heyliger v. State Univ. & Cmty. Coll. Sys. of Tenn.*, 126 F.3d 849, 855 (6th Cir. 1997).

plaintiff's inability to initially file the Title VII claim with other claims concerning the same cause of action.[85] The reasoning behind these results is clear: if a plaintiff did not have the obligation to merge the claim with a pending district court action, "a significant fraction of legally questionable discharges would give rise to two suits," which would cause an "inefficient manner of litigation . . . ."[86]

The dissent asserts that his approach of evaluating "the application of res judicata at the time the complaint is filed fits the doctrine's purpose to avoid claim splitting in the form of unnecessary repeat litigation, especially vexatious repeat litigation."[87] This approach, however, would upend the basic principle that res judicata arises *from a judgment*.[88] Thus, if two actions are pursued simultaneously, the first judgment to be entered is entitled to res judicata effect without regard to the order in which the two were commenced.[89]

The dissent also expresses concern that the application of res judicata in these circumstances could require complainants to rush to merge their SOX claims with their concurrent district court litigation at the 180-day mark to avoid potential dismissal on res judicata grounds.[90] While a party may need to take a few additional procedural steps in these circumstances, the requirement is nonburdensome and does not require efforts beyond ordinary due diligence to avoid a race to the courthouse.[91] A SOX complainant has several options available to avoid claim preclusion. For example, a party awaiting the 180-day mark may bring their other claims in district court and request to stay the proceedings until they

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85 *See, e.g.*, *Davis v. Dallas Area Rapid Transit,* 383 F.3d 309, 315-16 (5th Cir. 2004) (describing several of the circuit courts' holdings on this issue).

86 *Herrmann v. Cencom Cable Assocs., Inc.*, 999 F.2d 223, 225 (7th Cir. 1993). The dissent's reliance on *Addis v. Dep't of Labor*, 575 F.3d 688 (7th Cir. 2009) is misplaced. The court held that res judicata did not apply because the complainant in that case was unable to bring her ERA claim (which, like SOX, requires DOL administrative adjudication) before the Illinois state court and unable to bring her Illinois claim before the Department. *Id.* at 689. That is not the case here, however, because Gladden was able to bring her SOX claim before the district court.

87 Dissent at 32.

88 18 WRIGHT, MILLER & COOPER, *supra* note 54, § 4404.

89 *Id.*

90 Dissent at 36.

91 *Rivers v. Barberton Bd. of Educ.*, 143 F.3d 1029, 1033 (6th Cir. 1998); *Heyliger*, 126 F.3d at 856.

can amend the SOX claim to the pending action.[92] The complainant may also wait to file the other claims until after the SOX claim can be brought in federal court.[93] Further, the parties can explicitly agree to split the claims into separate suits or to not apply the statute of limitations for the other related claims while the SOX claim matures.[94] Complainant could have employed any of these measures to avoid res judicata but did not do so.

3. Same Cause of Action

The final element of res judicata requires that both actions involve the same cause of action.[95] For the purposes of res judicata, cases involve the same cause of action if they share the same nucleus of operative facts or factual predicate.[96] Courts make a fact-based inquiry to determine whether multiple actions arise out of the same cause of action.[97] Complainant's Title VII claim in district court alleged that Respondent had unlawfully discriminated against her based on her gender and retaliated against her when it terminated her employment. Complainant's claim before the ALJ alleged that Respondent had violated the SOX by discharging her in retaliation for engaging in protected activity. Accordingly, both claims concern whether her termination was unlawful and, thus, arise out of the same cause of action.[98] Therefore, all four elements of res judicata are met.

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92 *See, e.g., Herrmann*, 999 F.2d at 225.

93 *Palka v. City of Chicago*, 662 F.3d 428, 438 (7th Cir. 2011).

94 *Id.* Complainant and the amicus argue that Respondent acquiesced to claim splitting, thereby waiving the ability to rely on a *res judicata* defense. However, as discussed in Section 4 of this Decision, we find that Respondent did not acquiesce to claim splitting.

95 *Abbs*, ARB No. 2008-0017, slip op. at 7; *In re Piper Aircraft Corp.*, 244 F.3d at 1296.

96 *Griswold v. Cnty. of Hillsborough*, 598 F.3d 1289, 1293 (11th Cir. 2010).

97 *Trustmark Ins. Co. v. ESLU, Inc.*, 299 F.3d 1265, 1269-70 (11th Cir. 2002).

98 In *Riel v. Morgan Stanley*, the court found that "[t]his action and the related action . . . both arise out of Morgan Stanley's termination of Riel's employment." No. 06-CV-5801, 2009 WL 2431497, at * 1 (S.D.N.Y, Aug. 6, 2009). Thus, the "claims asserted in [the first action] were based on essentially the same operative facts plaintiff had relied on in his [second action, the] SOX complaint before OSHA." *Id.*

4. Exceptions to Applying Res Judicata

A. Acquiescence

When a defendant acquiesces to claim splitting, the defendant waives a res judicata defense.[99] Consent to claim splitting may be "in express words or otherwise."[100] Courts have "recogniz[ed] an exemption to res judicata when the parties have agreed *in terms or in effect* that the plaintiff may split his [or her] claim."[101]

Amicus argues that the ALJ erred in dismissing this case as res judicata because P&G acquiesced in the splitting of Gladden's claims between the Department and the federal district court.[102] Specifically, amicus asserts that P&G acquiesced to parallel proceedings before the federal district court and the Department, by (1) failing to timely object to claim splitting and (2) affirmatively acknowledging the claim splitting prior to the federal court's entry of judgment on Gladden's Title VII claim.[103] We disagree with amicus because Respondent timely objected to claim splitting and, although it is a close call, we find that Respondent did not expressly consent or consent "in effect" to claim splitting.

i. Respondent Timely Objected to Claim Splitting

In an effort to avoid a finding of acquiescence, P&G asserts that it made objections to claim splitting at various times and in all forums where the cases were pending. Specifically, P&G points to its statements in: (1) Respondent's July 25,

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99 Amicus Br. at 11-12. *See also Riel*, 2009 WL 2431497, at *6.

100 *Lee v. Norfolk S. Ry. Co.*, 187 F. Supp. 3d 623, 629 (W.D.N.C. 2016), *aff'd*, 670 F. App'x 777 (4th Cir. 2016) (inner quotations and citations omitted).

101 *Id.* (emphasis added) (inner quotations and citations omitted).

102 On appeal, Complainant raised acquiescence in its Initial Brief and Reply Brief. Comp. Br. at 17, 21; *see also* Comp. Reply Br. at 5. The parties robustly briefed the issue of acquiescence in response to the Assistant Secretary's Amicus Brief. Complainant specifically adopted the Assistant Secretary's position that the ALJ erred in applying *res judicata* to bar a hearing of her claims on the merits, while also noting minor opposition to certain points in the Amicus Brief. Comp. Response to Amicus Br. at 2.

103 Amicus Br. at 13. The Assistant Secretary explained that "a defendant's failure to promptly object to claim splitting and a defendant's affirmative acknowledgement that separate claims will go forward support a finding that a defendant acquiesced to two claims proceeding in separate forums." *Id.* (citing *Lee*, 187 F. Supp. 3d at 629).

2019 Letter to the OSHA Investigator in the investigative stage of the SOX action; (2) Respondent's October 9, 2019 Answer in the Title VII federal court proceeding, while the SOX action was still under investigation; (3) Respondent's April 23, 2021 Initial Disclosures to Gladden at the ALJ adjudicatory stage of the SOX action; and (4) Respondent's May 4, 2021 memorandum in support of its Motion for Dispositive Action in the SOX action before the ALJ. We examine each of these in turn.

a. Respondent's Letter to the OSHA Investigator in the SOX Action

During OSHA's investigation into the SOX complaint, P&G filed a letter with the investigator on July 25, 2019, in which P&G noted that Gladden's SOX complaint had been "superseded" by Gladden's Title VII lawsuit, filed on June 26, 2019.[104] P&G asserted: "Gladden's federal lawsuit claims defeat her SOX claims with OSHA because she asserts that she would still be employed by P&G if it were not for gender discrimination and her complaints about gender discrimination."[105] In addition, P&G argued that "[t]his means that [Gladden] contends her purported complaints about Promoveo's alleged breaches of contract would not have resulted in her termination and SOX is not implicated in any way."[106]

A statement that a SOX claim is "superseded" by a separate Title VII claim is neither expressly nor unambiguously an objection to splitting those two claims in two different forums. Taken out of context, these statements could be perceived as an *indirect* objection to Gladden maintaining separate claims based on the same set of facts. Here, however, P&G made this statement to persuade OSHA to dismiss the complaint because Gladden's claim that she was terminated due to her gender was inconsistent with her claim that she was terminated because of her SOX-protected activity. This argument was made in an effort to persuade OSHA that the SOX-claim had no merit, not to suggest that it should be joined with Complainant's Title VII claim.[107] Hence, we are unable to conclude that these statements, standing alone, constitute an objection to claim splitting that would put Complainant on notice that P&G was objecting and thereby preserving its *res judicata* defense.

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[104] Resp. Suppl. App. at Tab 13, Resp. Response. Letter to Comp. June 24, 2019 Letter at 8.

[105] *Id.*

[106] *Id.*

[107] Gladden could *not* have removed her SOX claim to federal court at that moment in time because her claim was still within the 180-day OSHA investigation period.

b. Respondent's Answer in the Title VII Lawsuit

On October 9, 2019, P&G filed its Answer in the Title VII action, in which P&G claimed that "Plaintiff's claims are barred, in whole or in part, by the doctrines of waiver, estoppel, and/or unclean hands."[108] P&G argued that its reference to waiver and estoppel defenses constituted an objection to claim splitting.[109] The inclusion of boilerplate waiver and estoppel affirmative defenses in a filed Answer, standing alone, is not a clear, unambiguous objection to claim splitting in that it provides no notice to the other party of the specter of res judicata. Notably, Federal Rule of Civil Procedure 8(c)(1) identifies res judicata, estoppel, and waiver as separate and distinct affirmative defenses.[110] Although the Rule's reference to estoppel has been treated as including collateral estoppel (issue preclusion), a variety of res judicata,[111] we find that P&G's single reference to "estoppel" was insufficient to constitute an objection to Gladden splitting her claim between the administrative and Article III forums. A boilerplate assertion of estoppel could not have put the Complainant on notice that P&G intended to raise or preserve the defense of res judicata.

c. Respondent's Initial Disclosures to Gladden in the SOX Action

On February 8, 2021, OSHA completed its investigation, and on March 9, 2021, Complainant objected to the investigator's findings and requested a hearing before an ALJ in the SOX matter.[112] Respondent objected to claim splitting on April 23, 2021, when it submitted initial disclosures to Gladden in the SOX matter before the ALJ.[113] P&G stated: "P&G . . . objects to this appeal because Gladden is pursuing piecemeal litigation about the subject of her termination in two separate forums."[114]

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108 Resp. Suppl. App. at Tab 14, Resp. Answer at 12.

109 Resp. Response. to Amicus Br. at 6, 8-9.

110 *See* FED. R. CIV. P. 8(c)(1).

111 18 WRIGHT, MILLER & COOPER, *supra* note 54, § 4405; *see also id.* at § 4402 (explaining terminology and distinction between claim preclusion (res judicata) and collateral estoppel (issue preclusion) (citations omitted)).

112 D. & O. at 2.

113 Resp. App. at Tab 15, Resp. Initial Disclosures.

114 *Id.* at 1 n.1.

This objection was unequivocal and occurred prior to September 8, 2021—the date the district court entered final judgment on Gladden's Title VII claim. Therefore, P&G sufficiently notified Complainant of potential res judicata implications of her multiple claims and provided Complainant with the opportunity to preserve her claims through consolidation.[115]

d. Respondent's Motion for Dispositive Action in the SOX Action

On May 4, 2021, Respondent objected to claim splitting when it filed a memorandum in support of its Motion for Dispositive Action in the SOX action. Respondent noted in the memorandum that: "P&G . . . objects to issues of Gladden's discharge being heard piecemeal in different venues."[116] Again, this objection was unequivocal and occurred prior to September 8, 2021—the date the district court entered final judgment on Gladden's Title VII claim. Therefore, P&G adequately raised the potential res judicata implications for Complainant's consideration and thereby presented Complainant with an opportunity to consolidate her claims.[117]

ii. Respondent Did Not Consent to Claim Splitting

Having found that P&G objected to claim splitting, we now consider whether P&G consented expressly or "in effect." Amicus argues that Respondent "made affirmative statements acknowledging the claim splitting" and Respondent "in effect consented" to claim splitting in its Opposition Memorandum.[118] Specifically, amicus highlighted that P&G stated in its Opposition Memorandum: "Gladden has a pending OSHA [c]harge she brought pursuant to the Sarbanes-Oxley Act ('SOX'), in which she brought similar, meritless claims regarding purported retaliation for compliance concerns. The elements of a SOX retaliation claim stand independent of and are unrelated to Title VII claims."[119] P&G also claimed that "[t]hese are different statutes concerning different fact situations," and that the court "should

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115 *See Riel*, 2009 WL 2431497, at *6.

116 Resp. App. at Tab 1, Resp. Mot. for Dispositive Action at 7 n.6.

117 *See Riel*, 2009 WL 2431497, at *6.

118 Amicus Br. at 13, 15-17.

119 Amicus Br. Ex. A, Resp. Mem. Opp'n to Comp. Mot. Summ. J. at 14-15 (citations omitted); *see also* Amicus Br. at 16-17.

ignore any effort by Gladden to conflate the two."[120] In Response to the argument raised by amicus, Respondent argues that these statements do not establish any consent to claim splitting.[121]

Reviewing Respondent's statements in context, we do not interpret them to imply that Respondent consented "in effect" to claim splitting. In Gladden's January 11, 2021 Motion for Summary Judgment in the Title VII action, Gladden raised claims of gender discrimination and retaliation for opposing discrimination,[122] but Gladden also raised allegations related to fraud and contract violations by Promoveo. In particular, Complainant alleged that "Promoveo had several contract violations and was committing fraud both against [P&G] and Promoveo Employees. Gladden made Promoveo and [P&G]'s management aware of contract violations and fraud against [P&G] and Promoveo employees."[123] In its Opposition Memorandum, Respondent argued that Gladden had attempted to "make this case about purported contract noncompliance concerns or Promoveo's corporate structure," which Respondent described as a "red herring."[124]

In these statements, Respondent emphasized the differences between the SOX and Title VII actions to demonstrate Complainant's inconsistent rationales for Gladden's termination, not to consent to claim splitting "in effect." Specifically, Respondent stated in the Opposition Memorandum that Complainant's SOX "claim is at odds with [Gladden's] allegations in this case in that it involves a wholly different alleged motivation for her discharge."[125] Respondent further emphasized

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120 Amicus Br. Ex. A, Resp. Mem. Opp'n to Comp. Mot. Summ. J. at 15; *see also* Amicus Br. at 17. Amicus claims Respondent consented "in effect" to claim splitting, like the defendant was found to have done in *Pueschel v. United States*, 369 F.3d 345 (4th Cir. 2004). Amicus Br. at 16. Amicus highlights how in *Pueschel*, "the defendant acquiesced to claim splitting" because "the defendant noted that Pueschel had 'filed another administrative EEO complaint' which was 'being investigated and thus not part' of the lawsuit before the court." *Id.* at 15-16 (citing 369 F.3d at 356).

121 Resp. Response to Amicus Br. at 14-15. P&G contends that its statements in the Title VII case are distinct from *Pueschel*, because in *Pueschel*, the OWCP "claim was different from the other claims and the defendant recognized this difference in briefing." *Id.* at 14. In contrast, P&G argues "Gladden's Title VII and SOX wrongful discharge claims concern the same decision, her discharge." *Id.* at 15.

122 Comp. Mot. Summ. J. at 1.

123 *Id.* at 4 (citations omitted).

124 Amicus Br. Ex. A, Resp. Mem. Opp'n to Comp. Mot. Summ. J. at 14.

125 *Id.* at 15 n.5.

Gladden's inconsistent rationales for termination, stating: "It would seem even Gladden is not certain what it is she believes was the basis for P&G's decision to terminate her employment."[126] Therefore, when Respondent highlighted differences between the SOX and Title VII suits, Respondent was not effectively consenting to claim splitting. Instead, Respondent was attempting to illustrate how Complainant had advanced inconsistent theories for her termination in order to undermine Complainant's argument and credibility.

Respondent's statements also do not squarely fit within the types of statements courts have found to constitute consent to claim splitting. P&G did not expressly or clearly consent to claim splitting, in contrast to the defendant's statements in *Matter of Super Van, Inc.*[127] The court in that case found that the defendants acquiesced to claim splitting because they "actually stated a preference for the splitting."[128] When the court *sua sponte* raised the issue of whether the two suits should be consolidated, defendants' counsel "stated that the defendants . . . preferred not to have the two actions consolidated."[129] In the present case, unlike the defendants in *Matter of Super Van, Inc.*, Respondent did not clearly consent to claim splitting or state a preference for claim splitting.

The facts in this case are also distinct from those in *Lee v. Norfolk Southern Railway Company*,[130] a case cited by amicus to show that P&G consented "in effect" to Gladden splitting her claims.[131] In *Lee*, the defendant's counsel noted in a deposition that "the agreement among counsel is that **whether the OSHA complaint can be gotten into in this lawsuit will be deferred** . . . ."[132] The

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126 *Id.*

127 92 F.3d 366, 371 (5th Cir. 1996). The court also found that the defendants acquiesced to claim splitting because they never objected to claim splitting. *Id.*

128 *Id.*

129 *Id.* at 369. Defendants' counsel "stated two reasons for preferring no consolidation: the defendants (1) did not want to confuse the issues because the First Adversary Proceeding 'is one particular matter' while the instant suit involved many more issues and facts; and (2) were satisfied to leave the First Adversary Proceeding in bankruptcy court but wanted the instant suit to go before a jury because of the larger damages at stake." *Id.* at 369 n.8.

130 187 F. Supp. 3d 623, 187 F. Supp. 3d 623 (W.D.N.C. 2016), *aff'd*, 670 F. App'x 777 (4th Cir. 2016).

131 Amicus Br. at 16-17.

132 *Lee*, 187 F. Supp. 3d at 629.

Court found that, even though the relevant statements were "not the pinnacle of clarity, it was a sufficient basis to support Lee's reliance in splitting his claims."[133] In other words, the Court found that the defendants in effect consented to claim splitting in the deposition statements and that, due to counsel's statements, the complainant was never put on notice to preserve his claims.

In the case at hand, Respondent's Opposition Memorandum is also not the "pinnacle of clarity," but lack of clarity does not imply consent "in effect." Unlike in *Lee*, where the defendants expressly discussed consolidation and deferred the issue of whether the claims would be consolidated to a later date, Respondent's Opposition Memorandum did not address the issues of consolidation or claim splitting. Instead, Respondent focused on highlighting the differences in the suits to emphasize Complainant's inconsistent rationales for termination and undermine Complainant's argument.

Moreover, even if one could argue that Respondent consented "in effect" to claim splitting in its Opposition Memorandum, Respondent subsequently raised timely objections, which notified Complainant of the need to consolidate her claims.[134] Therefore, we conclude that Respondent did not acquiesce to claim splitting, either expressly or in effect.

B. Manifest Injustice

Complainant argues that, even if the elements of res judicata are met, the doctrine should not apply because doing so would result in manifest injustice in this case. Complainant argues that she did not engage in vexatious litigation and that the dismissal was inconsistent with the purpose of res judicata. Further, she notes that she did not join the SOX claim in the district court action because she was required to initially bring the claim separately and that neither the statutory

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133 *Id.*

134 P&G's objections distinguish the instant case from *Lee* and *Matter of Super Van, Inc.* The *Lee* court found that the defendant did not timely object to claim splitting while the suits were pending at the same time, therefore the complainant was never put on notice to preserve his claims. *Id.* at 630. The court in *Matter of Super Van, Inc.* similarly found that the defendants acquiesced to claim splitting because they never objected to claim splitting. 92 F.3d at 371.

language of SOX nor OSHA's kick-out letter provided that she *had* to move the claim to federal court.[135]

Courts have on rare occasions rejected strict application of res judicata when its use would result in manifest injustice.[136] This exception should be applied only in narrow circumstances, such as when personal liberty is at stake or in cases involving civil commitment of the mentally ill or custody of a child.[137] The United States Supreme Court has also "cautioned against departing from accepted principles of res judicata,"[138] stating that there is "no principle of law or equity which sanctions the rejection of" res judicata.[139] Because Complainant had ample opportunity to merge her SOX claim with the Title VII action but failed to attempt to join the two, the ALJ did not err in declining to apply the manifest injustice exception.[140]

Further, the application of res judicata in this case does not conflict with the purpose of the doctrine. A "major function of the doctrine" is to "prevent piecemeal litigation."[141] Here, Respondent would have had to defend against two separate actions in different tribunals at various times, despite Complainant's ample opportunity to merge the two actions in district court. Though she criticizes the permissive language regarding removal of the claim from OSHA under the SOX that did not apprise her of the application of claim preclusion, it was Complainant's obligation to organize her litigation to avoid res judicata and preserve her claims.[142] Accordingly, the ALJ correctly dismissed the claim under the doctrine of res judicata.

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135 Comp. Br. at 13-16.

136 *Moch v. E. Baton Rouge Par. Sch. Bd.*, 548 F.2d 594, 597 (5th Cir. 1977), *cert. denied*, 98 S.Ct. 183 (1977).

137 Restatement (Second) of Judgments § 26 cmt. i (1982) (updated 2022).

138 *Griswold*, 598 F.3d at 1294.

139 *Id.* (quoting *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981) (inner quotations omitted)).

140 *Id.*; *see also Jang*, 206 F.3d at 1149 n.3 (declining to apply manifest injustice exception despite EEOC's failure to issue the plaintiff with a right-to-sue letter upon request).

141 *Norfolk S. Corp. v. Chevron, U.S.A., Inc.*, 371 F.3d 1285, 1290 (11th Cir. 2004).

142 *Churchill v. Star Enters.*, 183 F.3d 184, 191 (3d Cir. 1999).

5. Complainant's Motion for Reconsideration

Complainant also contests the ALJ's decision to deny her motion for reconsideration. Granting a motion for reconsideration is appropriate when the tribunal clearly made a mistake of fact or law or when the factual situation has changed materially since the previous decision.[143] Rulings on motions for reconsideration are reviewed under an abuse of discretion standard.[144] Complainant did not allege any major factual changes between the dismissal and the motion for reconsideration, and the ALJ did not make an error of law or fact when dismissing the case. Therefore, the ALJ did not abuse her discretion in denying reconsideration.

CONCLUSION

Because res judicata bars Complainant's SOX claim against Respondent, we **AFFIRM** the ALJ's D. & O. and Order Denying Complainant's Motion for Reconsideration.[145]

SO ORDERED.[146]

SUSAN HARTHILL
Chief Administrative Appeals Judge

TAMMY L. PUST
Administrative Appeals Judge

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143 *Powers v. Pinnacle Airlines, Inc.*, ARB No. 2006-0078, ALJ Nos. 2006-AIR-00004, -00005, slip op. at 8 n.13 (ARB June 28, 2007).

144 Auto. Alignment & Body Serv., Inc. v. State Farm Mut. Auto. Ins. Co., 953 F.3d 707, 719 (11th Cir. 2020) (citing Lockard v. Equifax, Inc., 163 F.3d 1259, 1267 (11th Cir. 1998)).

145 In her reply brief, Complainant requested an opportunity to present an oral argument for this appeal. We decline this request.

146 In any appeal of this Decision and Order that may be filed, we note that the appropriately named party is the Secretary, Department of Labor, not the Administrative Review Board.

BURRELL, Administrative Appeals Judge, concurring in part, dissenting in part:

Respectfully, I dissent from the majority's affirmance of the ALJ's application of res judicata. I would reverse the ALJ's decision because the doctrine of res judicata was not available to extinguish Complainant's SOX claim. I concur with the majority's acquiescence analysis, but add that Complainant did not split her claims, and thus the Respondent did not acquiescence to claim splitting.

BACKGROUND

On March 21, 2019, Complainant filed gender discrimination and retaliation claims with the Equal Employment Opportunity Commission (EEOC), alleging that Respondent had violated Title VII of the Civil Rights Act of 1964.[147] The EEOC issued a Notice of Right to Sue to Complainant, stating that it could not complete its investigation within 180 days.[148] On June 26, 2019, Complainant filed her Title VII claim in the U.S. District Court for the Northern District of Georgia.[149] On September 8, 2021, the District Court issued a final order adopting the magistrate's recommendation and dismissing the Title VII action.[150]

On March 22, 2019, Complainant filed a complaint with OSHA, alleging that Respondent had violated the SOX by discharging her in retaliation for her reporting protected activities.[151] On September 19, 2019, OSHA informed Complainant that she may bring her SOX complaint in federal court because the Department of Labor had not issued a decision on her claim within 180 days.[152] Complainant did not elect to file her claim in federal court. On February 8, 2021, OSHA determined that Respondent had not violated the SOX.[153] Complainant filed objections with the ALJ,

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147 *Gladden v. Proctor & Gamble Distributing LLC*, No. 19-CV-2938, 2021 WL 4929913 (N.D. Ga. Sept. 8, 2021).

148 Comp. App. at Tab F, EEOC Notice of Right to Sue.

149 *Gladden v. Proctor & Gamble Distributing LLC*, No. 19-CV-2938, 2021 WL 4930535 (N.D. Ga. July 26, 2021) (magistrate's report and recommendation for summary judgment).

150 *Gladden*, 2021 WL 4929913 (N.D. Ga. Sept. 8, 2021) (District Court adopting Magistrate's report and recommendation).

151 D. & O. at 1-2.

152 Gladden's Mot. for Recon., Ex. A. Under SOX, if the DOL has not issued a final decision on the complaint within 180 days of filing, the claimant may seek de novo review in federal district court. 18 U.S.C. § 1514A(b)(1)(B).

153 D. & O. at 2.

asking for a hearing. Before the ALJ, on September 24, 2021, shortly after the conclusion of the federal litigation, Respondent moved to dismiss on res judicata grounds as the Northern District of Georgia had dismissed a Title VII action arising from the same general facts underlying Complainant's SOX claim. The ALJ granted Respondent's motion to dismiss on October 22, 2021.[154]

DISCUSSION

The ARB reviews the ALJ application of res judicata de novo as a question of law.[155] Res judicata, specifically claim preclusion, is the judicial preclusion of a second claim based on the litigation between the same parties in a prior claim. Res judicata has four main elements: (1) a final decision on the merits in the first action by a court of competent jurisdiction; (2) the second action involves the same parties or their privies as the first action; (3) the second action raises the same claim litigated or a claim which could have been litigated in the first action; and (4) the cases involve the same cause of action.[156] In simple prose, res judicata bars relitigation of claims that were or could have been litigated in a prior action or proceeding.[157]

1. Final Decision on the Merits, Same Parties or Privities, and Same Cause of Action

I concur with the lead opinion that the Title VII litigation was a final decision on the merits by a court of competent jurisdiction involving the same parties or privities. Under the transaction test, the Title VII and SOX claims constitute the same cause of action as they involve the same operative facts even though Complainant requests different legal theories of relief.[158]

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154 D. & O. at 7.

155 *Gallas v. The Med. Ctr. of Aurora*, ARB Nos. 2016-0012, 2015-0076, ALJ Nos. 2015-SOX-00013, 2015-ACA-00005, slip op. at 4 (ARB Apr. 28, 2017) ("The ARB reviews de novo an ALJ's orders on motions to dismiss and for summary decision."); *Richardson v. Miller*, 101 F.3d 665, 667-68 (11th Cir. 1996) (res judicata is a legal question).

156 *Abbs v. Con-Way Freight, Inc.*, ARB No. 2008-0017, ALJ No. 2007-STA-00037, slip op. at 7 (ARB July 27, 2010); *In re Piper Aircraft Corp.*, 244 F.3d 1289, 1296 (11th Cir. 2001) (citations omitted).

157 *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008); *Ashbourne v. Hansberry*, 894 F.3d 298, 302 (D.C. Cir. 2018).

158 *Batchelor-Robjohns v. United States*, 788 F.3d 1280, 1285-86 (11th Cir. 2015) (where a case "arises out of the same nucleus of operative fact, or is based upon the same factual

2. Litigating the SOX Claim in the Federal District Court

Where I differ from the majority opinion is whether the claim could have been brought in the prior litigation and the timing of that analysis. Because there was overlap, I concur with the lead opinion that Complainant could have filed her SOX claim with the District Court during the pendency of the Title VII litigation under SOX's kick-out procedure. The SOX claim reached the 180-day mark on September 18, 2019. The federal claim was not dismissed until September 8, 2021. But I disagree with the ALJ and the lead opinion that Complainant was compelled to do so under res judicata principles. This is so because this right matured after she filed her respective Title VII and SOX claims.

A. Res Judicata Criteria Are Measured at the Time the Complaint is Filed

The transaction test asks whether the two theories of recovery arise from the same nucleus of facts surrounding an event. If so, then for purposes of res judicata, the two separate claims involve the same cause of action even though they may involve different theories of recovery.[159]

Notwithstanding that two claims might constitute the same cause of action, courts do not generally apply res judicata to extinguish a second claim if it could not have been brought in the first claim at the time the first claim was filed or merged with the first claim during the pendency of the first claim but before the second claim was filed.[160] For example, if a first claim involved unlawful harassment in violation of law protecting status or conduct, and the complainant was fired after filing the first complaint, a second claim of unlawful termination may not be precluded because it could not have been brought at the time the first complaint

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predicate," as a former action, the two cases constitute the same "claim" or "cause of action" for purposes of res judicata) (quoting *Ragsdale v. Rubbermaid, Inc.*, 193 F.3d 1235, 1239 (11th Cir. 1999)).

[159] *Ragsdale*, 193 F.3d at 1239.

[160] 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4409 n.10 (3d ed. Apr. 2023 update).

was filed.[161] A party may join the claims in supplemental pleadings but is not compelled to do so.[162]

In *Manning*, the Eleventh Circuit reasoned that the parties frame the scope of litigation at the time the complaint is filed and that a judgment is only conclusive regarding matters the parties might have litigated at that time but not regarding "new rights acquired pending the action which might have been, but which were not, required to be litigated."[163] The Court:

> [W]e do not believe that the res judicata preclusion of claims that "could have been brought" in earlier litigation includes claims which arise after the original pleading is filed in the earlier litigation. Instead, we believe that, for res judicata purposes, claims that "could have been brought" are claims in existence at the time the original complaint is filed or claims *actually* asserted . . . in the earlier action. Our decision avoids the "potentially unworkable requirement that every claim arising prior to entry of a final decree must be brought into the pending litigation or lost."[164]

In *Legnani v. Alitalia Linee Aeree Italiane, S.P.A.*,[165] the plaintiff filed a Title VII and New York City Human Rights Law claim against her employer. After filing, she was fired and sought to amend her complaint to add retaliatory discharge, which was denied. Thereafter, she filed a second claim of retaliatory discharge. The

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161 "Res judicata is no defense where, between the first and second suits, there has been a[ ] . . . modification of significant facts creating new legal conditions." *Jaffree v. Wallace*, 837 F.2d 1461, 1469 (11th Cir. 1988) (quoting *Jackson v. DeSoto Parish School Bd.*, 585 F.2d 726, 729 (5th Cir. 1978)). State law may vary on this point.

162 18 WRIGHT, MILLER & COOPER § 4409 nn.10-14. There may be exceptions. Under state law, for example, a party, to avoid res judicata, may be compelled to supplement claims arising after filing but during the pendency of the first claim. See § 4409 n.14 ("Michigan imposes a duty to supplement the initial complaint with related fact allegations that develop during the pendency of the state-court action.").

163 *Manning v. City of Auburn*, 953 F.2d 1355, 1360 (11th Cir. 1992) (internal quotations omitted).

164 *Manning*, 953 F.2d at 1360 (footnote omitted) (quoting *Los Angeles Branch NAACP v. Los Angeles Unified Sch. Dist.*, 750 F.2d 731, 739 n.9 (9th Cir. 1984)).

165 400 F.3d 139, 141-43 (2d Cir. 2005).

Second Circuit concluded that res judicata did not block her second claim. The termination claim was not available to her at the time she filed her first claim.[166] In *Los Angeles Branch NAACP*, the Ninth Circuit wrote:

> The scope of litigation is framed by the complaint at the time it is filed. The rule that a judgment is conclusive as to every matter that might have been litigated does not apply to new rights acquired pending the action which might have been, but which were not, required to be litigated . . . . Plaintiffs may bring events occurring after the filing of the complaint into the scope of the litigation by filing a supplemental complaint with leave of the court, . . . but there is no requirement that plaintiffs do so.[167]

A similar result occurs if the first court's jurisdiction is limited from considering the second claim.[168] Although the above examples involve new factual developments occurring after the first claim was filed, I would hold that these cases are analogous, for purposes of res judicata, to Complainant's statutory right to file in federal court under the 180-day kick-out maturing after the respective claims were filed.[169]

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166 *Id.* at 141-43 (internal citations omitted); *Curtis v. Citibank, N.A.*, 226 F.3d 133, 139-40 (2d Cir. 2000) ("The crucial date is the date the complaint was filed. The plaintiff has no continuing obligation to file amendments to the complaint to stay abreast of subsequent events."); *Bethel World Outreach Ministries v. Montgomery Cnty. Council*, 706 F.3d 548, 554 n.2 (4th Cir. 2013) ("[T]o avoid res judicata, a plaintiff need not 'expand its suit in order to add a claim that it could not have asserted at the time the suit was commenced.'"); *Ripplin Shoals Land Co., LLC v. U.S. Army Corps of Eng'rs*, 440 F.3d 1038, 1042 (8th Cir. 2006) ("[R]es judicata does not apply to claims that did not exist when the first suit was filed.").

167 *Los Angeles Branch NAACP*, 750 F.2d at 739 (internal quotation marks omitted).

168 Restatement (Second) Judgments § 26(c) (1982); 18 WRIGHT, MILLER & COOPER § 4412.

169 "There is no preclusion of a claim that was not mature at the time the first action was filed." 18 WRIGHT, MILLER & COOPER § 4406 n.16. The case that § 4406 cites to at n.16 is distinguishable as the claim matured not only after filing but also after judgment in the prior action. Nonetheless, drawing the line at the time the claim was filed fits the purpose of res judicata and avoids the difficulty of requiring parties amend to include their post-filing rights or lose them. *Supra* note 164; *cf. Welsh v. Fort Bend Indep. Sch. Dist.*, 860 F.3d 762, 764-67 (5th Cir. 2017) (Texas law does not invoke preclusion for claims that were not mature at the time of the first action or that could not have been litigated because administrative remedies had not been exhausted).

Evaluating the application of res judicata at the time the complaint is filed fits the doctrine's purpose to avoid claim splitting in the form of unnecessary repeat litigation, especially vexatious repeat litigation. Claim splitting occurs when a complainant has one or more claims arising from the same nucleus of facts in multiple tribunals that could have been filed in the same forum.[170] The doctrine is one of judicial efficiency and fairness to the courts and parties to avoid multiple trials, multiple sets of discovery, burdens on witnesses, and so on. "To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions."[171]

From the perspective of both the district court and the ALJ, Complainant had to file both claims in separate tribunals. They were not part of the same convenient trial unit. Complainant could not have included her Title VII claims with her administrative SOX claim as DOL's jurisdiction is limited to the statutes assigned to it. At the time that Complainant filed her Title VII claim, she also could not have included her SOX claim because she was required to exhaust administrative remedies. Complainant's adjudication before the DOL is more than a gatekeeping function and opportunity for conciliation or arbitration prior to federal litigation as it includes not only an OSHA investigation (accompanied by the potential remedy of preliminary reinstatement) but is followed by the opportunity for either party to request an adjudicatory hearing with a DOL administrative law judge, with appeal rights to this agency review Board.[172] The DOL's adjudication receives a level of deference by the federal courts if parties seek judicial review from the final agency decision.[173]

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170 *Vanover v. NCO Fin. Servs., Inc.*, 857 F.3d 833, 841 (11th Cir. 2017) (analyzing the interrelationship between claim splitting and res judicata); *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008).

171 *Montana v. United States*, 440 U.S. 147, 153-54 (1979).

172 29 C.F.R. Part 1980.

173 "Legal conclusions are reviewed de novo, keeping in mind that agencies often receive deference in construing the statutes they administer." *DeKalb Cnty. v. U.S. Dep't of Labor*, 812 F.3d 1015, 1020 (11th Cir. 2016) (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984)).

Thus, the two tracts of litigation had to begin separately in separate tribunals. As the Seventh Circuit said in a comparable whistleblower case, "[Complainant] was unable to bring her ERA claim (which requires administrative adjudication) before the Illinois state court and unable to bring her Illinois claim before the Department of Labor. This precludes the application of res judicata."[174] When the statutory and regulatory frameworks force theories of recovery into separate tribunals, as is the case here, the applicability of res judicata is limited.

B. Cases Cited by the Majority Opinion and ALJ are Distinguishable

In granting Respondent's motion to dismiss based on res judicata, the ALJ relied upon *Evans v. Affiliated Computer Services,* another ALJ case.[175] The ALJ in *Evans* in turn relied upon *Thanedar v. Time Warner, Inc.*[176] The ALJs' reliance on *Thanedar* is misplaced as that case is distinguishable on key grounds. In *Thanedar*, the plaintiff filed a SOX claim with OSHA on January 18, 2005. Before filing that SOX claim, Thanedar had filed multiple claims, including a Title VII claim in federal district court. The district court dismissed the federal claim with prejudice on February 8, 2006.[177] Availing himself of SOX's kick-out provision, Thanedar subsequently filed his SOX claim with district court in a separate action on June 26, 2006.[178] In granting respondent's motion for res judicata, the district court, affirmed by the Fifth Circuit, evaluated Thanedar's options before filing the SOX claim in federal court. From the perspective of his second claim with the district court, he could have consolidated the claims in prior litigation. At the time that he filed his second complaint, he had prior federal litigation arising from the same nucleus of facts concluding on February 8, 2006. Thanedar chose to file in federal court once with the Title VII claims. Thanedar chose to file again in federal court with the SOX claim under the kick-out. This second case could have been avoided as it could have been merged with his first claim before the second claim was filed.

The majority opinion's EEO cases are subject to the same evaluation. In these cases, the court is evaluating two tracts of litigation and applying res judicata to

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174 *Addis v. Dep't of Labor*, 575 F.3d 688, 689 (7th Cir. 2009).

175 ALJ No. 2012-SOX-00035 (ALJ Jan. 29, 2019).

176 352 Fed. Appx. 891 (5th Cir. 2009). In a January 4, 2008 Order, the District Court assessed costs and sanctioned Thanedar for abusive conduct during a deposition.

177 *Thanedar*, 352 Fed. Appx. at 895.

178 *Id*.

preclude a second action by evaluating prior litigation before the second complaint was filed in federal court.[179] From this vista, the district court can squarely apply res judicata consistent with its principles. The plaintiff had federal litigation in the first claim and the EEO action became ripe[180] during the first federal lawsuit but before the second EEO claim had been filed in district court.[181]

Here, we do not face a complainant filing a new proceeding with the ALJ that could have been raised in prior litigation before filing the current claim with the ALJ.[182] In other words, the ALJ's application of res judicata is premature. A more analogous application to *Thanedar* and the EEO cases would be if Complainant had taken the additional step of filing her SOX claim with the district court through the kick-out. Had this been the case, Complainant would have first chosen to file the Title VII claim in district court and subsequently chosen to avail herself of the district court again with the SOX kick-out in a separate claim. From this vantage point of filing the second claim, the district court could deem the separate kick-out claim res judicata because it could have been merged with the district court while the Title VII claim was pending.

C. Leon v. IDX Systems Corp. is Distinguishable

The majority opinion also relies on *Leon v. IDX Systems Corp.*[183] In that case, the federal court dismissed the first tract of federal litigation based on a sanction due to spoilation of evidence.[184] The respondent also moved for a res judicata injunction to enjoin SOX litigation pending with OSHA at the investigation stage.

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179 *See, e.g.*, *Ashbourne*, 894 F.3d 298.

180 The EEOC gives parties the right to sue in federal court if it cannot complete its investigation within a specified time frame. https://www.eeoc.gov/filing-lawsuit.

181 *Woods v. Dunlop Tire Corp.*, 972 F.2d 36 (2d Cir. 1992).

182 While the 180-day mark occurred before the Complainant appealed the case to the ALJ, the complaint filed with OSHA and the appeal to the ALJ are part of the same administrative claim for purposes of res judicata. 18 U.S.C. § 1514A(b)(2) (citing 49 U.S.C. § 42121(b)(2) (filing objections and requesting a hearing before an ALJ)).

183 464 F.3d 951 (9th Cir. 2006).

184 *Leon v. IDX Sys. Corp.*, No. CO3-1158P, 2004 WL 5571412 (W.D. Wash. Sept. 30, 2004).

The district court denied the motion on lack of privity grounds.[185] The Ninth Circuit reversed, concluding that the elements of res judicata had been met because OSHA was in privity with Leon for purposes of res judicata analysis but remanding the injunction issue back to district court for further analysis.[186]

Leon is distinguishable based on facts unique to that case. First, federal courts have powers of injunction that administrative tribunals do not have. Under the All Writs Act (AWA) and principles of federal supremacy, federal courts may enjoin current and future proceedings in federal or state courts to protect federal jurisdiction or protect federal rulings from encroachment.[187] Second, the district court's consideration of a res judicata injunction was intertwined with the spoilation sanction underlying the first case. Leon had engaged in significant spoilation of evidence in bad faith. With res judicata injunctions, courts preclude future litigation *ab initio* to prevent the moving party from the additional expense of having to litigate and defend claims with res judicata multiple times.[188]

> Res judicata injunctions are most easily justified to protect against a clear demonstration that vexatious, multiplicitous, and harassing litigation of the same claim has not been deterred effectively by ordinary methods of defensive pleading. Some of the cases show appalling patterns of abuse by repetitive litigants that compel whatever protection may be affirmed by injunction and ensuing contempt proceedings.[189]

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185 *Leon v. IDX Sys. Corp.*, No. CO3-1158P, 2005 WL 6127300 (W.D. Wash. Feb. 15, 2005); *see also Leon v. IDX Sys. Corp.*, No. CO3-1158P, 2005 WL 6127299 (W.D. Wash. Apr. 7, 2005) (order denying reconsideration).

186 *Leon*, 464 F.3d at 962-63.

187 28 U.S.C. § 1651. For example, if a federal court dismisses a case with prejudice, it might enjoin state proceedings to protect its ruling. *Daewoo Electronics Corp. of Am., Inc. v. Western Auto Supply Co.*, 975 F.2d 474, 477, 479 (8th Cir. 1992) (discussing exceptions to the Anti-Injunction Act and citing the plaintiff's bad faith conduct as a basis for injunctive relief).

188 Other alternatives such as permitting litigation to continue subject to issue preclusion are less appropriate in light of the abusive conduct.

189 18 WRIGHT, MILLER & COOPER § 4405.1; *Thanedar,* 352 Fed. Appx. at 900 ("It is well-settled that a plaintiff's pro se status does not give him a 'license to harass others, clog the judicial machinery with meritless litigation, and abuse already overloaded court dockets.' There is no constitutional right to prosecute frivolous actions, and preclusion orders are appropriate tools for deterring vexatious filings. When issuing such an order,

Examining *Leon*'s res judicata injunction confirms that it was based on preserving and giving effect to the federal court's sanction in the first litigation. The district court did not mention the 180-day kick-out provision in its initial consideration of the res judicata injunction under the AWA or in its denial of reconsideration.[190] The Ninth Circuit on appeal mentioned the 180-day mark in a footnote as a basis for same cause of action.[191] Had merger rather than sanction been the focus, presumably the district court would have emphasized the 180-day mark.

3. The ALJ's Application of Res Judicata Conflicts with SOX's Statutory Scheme

The application of res judicata at the time the ALJ applied it is in conflict with the statutory scheme placing the administrative claim with the DOL and giving the complainant the election to file in federal court. It transforms the election to file in district court into a mandate or face res judicata dismissal. Further, there is considerable uncertainty as to how such an application would work under the various permutations that might arise after the 180-day mark in situations where complainant has federal litigation but complainant's preference is to keep her OSHA claim in the administrative forum.[192]

Judicial efficiency does not support the ALJ's application of res judicata. By statute, the two respective types of claims, Title VII and SOX, must begin in separate jurisdictions. Courts have protected the complainant's right to the administrative process followed by the election to kick out even when those two tracts of litigation are judicially inefficient.[193] In *Lawson v. FMR LLC*, the ALJ

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however, a court must ensure that it is 'tailored to protect the courts and innocent parties, while preserving the legitimate rights of litigants.'") (internal citations omitted).

190 *Leon*, No. CO3-1158P, 2005 WL 6127300, *reconsideration denied*, 2005 WL 6127299.

191 *Leon*, 464 F.3d at 962 n.8.

192 Under the ALJ's application of res judicata, there could be a race to the courthouse sometime after the 180-day mark that is inconsistent with SOX's providing complainants with the election to file in federal court.

193 *Pfeiffer v. Union Pac. R.R. Co.*, 2013 WL 1367054 *5 (D. Kan. Apr. 3, 2013) (finding that complainant's election following an adverse ALJ decision was not bad faith); *Wagner v. Grand Trunk Western R.R.*, No. 15-10635, 2016 WL 1161351 *4 (E.D. Mich. Mar. 23, 2016) (As the cases cited above demonstrate, the general rule is that removal pursuant to §

ruled against one of the parties, and the matter was on appeal with this Board.[194] Complainant kicked out the SOX claim to district court. Respondent moved for collateral estoppel, a sister of claim preclusion, based on the ALJ's ruling. Respondent argued that allowing the matter for a trial de novo in district court case would involve two tracts of litigation. The district court nonetheless refused preclusion due to the statutory scheme giving the complainant the election to pursue a new claim in district court. "To be sure, this may lead to duplication of factfinding by the DOL and the federal courts, but that repetition was clearly contemplated as possible by the statute's general provision for 'de novo review.'"[195]

In *Stone v. Instrumentation Lab. Co.*,[196] the Fourth Circuit stated:

> [A] literal interpretation of the [SOX] does not lead to an "absurd result." In so finding, we reject as contrary to the statute the Secretary's "suggestion" that district courts apply preclusion principles to effectuate a goal of efficiency. First, as noted above, the plain text of the statute expressly provides a complainant the right to de novo review. Second, the DOL's own regulations acknowledge that a district court action may be filed while an appeal is pending before the ARB. Third, even though preclusion principles are generally favored, "[c]ourts do not, of course, have free rein to impose rules of preclusion" if it was not intended by the legislature. . . .[197]

Respondents in these cases would disallow complainant's kick out following adjudication before the ALJ on preclusion and judicial efficiency grounds. Courts have consistently rejected these defenses, noting Congress permitted the de novo trial in district court.

20109(d)(3), even where it leads to the duplication of efforts and engenders frustration, does not constitute bad faith.).

194 *Lawson v. FMR LLC*, 724 F. Supp. 2d 141, 148 (D. Mass. 2010), *rev'd on other grounds*, 670 F.3d 61 (1st Cir. 2012), *rev'd*, 571 U.S. 429 (2014).

195 *Lawson*, 724 F. Supp. 2d at 151.

196 591 F.3d 239 (4th Cir. 2009).

197 *Id.* at 249 (citations omitted); *Lynch v. Union Pac. R.R. Co.*, 24 F. Supp. 3d 597, 601-02 (N.D. Tex. 2014).

The ALJ's application of res judicata in this case is the inverse of respondents' claims in *Lawson* and *Stone* and in violation of the same underlying principle. Here, the ALJ extinguished the administrative claim by res judicata because complainant *had not* taken advantage of the statutory election to file in federal court. I would hold that this application of res judicata is at odds with SOX's language. Congress legislates against a background of common-law adjudicatory principles, including res judicata.[198] Even though preclusion principles are generally favored, "[c]ourts do not, of course, have free rein to impose rules of preclusion" if it was not intended by the legislature.[199] In *Wagner v. Grand Trunk Western R.R.*, the Eastern District of Michigan stated:

> Congress has the authority to displace the common law by enacting a statute. To the extent that § 20109(d)(3) allows an employee to pursue claims that, in the absence of this statute, might be barred by res judicata or collateral estoppel, Congress had the power to authorize such claims. The statute provides for *de novo* review before a district court "if the Secretary of Labor has not issued a final decision within 210 days after the filing of the complaint and if the delay is not due to the bad faith of the employee[.]"[200]

I would remand the matter back to the ALJ for further proceedings.

THOMAS H. BURRELL
Administrative Appeals Judge

198 *Taylor*, 553 U.S. at 891.

199 Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108 (1991).

200 *Wagner*, No. 15-10635, 2016 WL 1161351 *5 (internal citation omitted).